Again on Article 20 of Regulation (EC) No 2201/2003

Reference for a preliminary ruling from the Bundesgerichtshof, Germany, in case C- 256/09 was lodged on 10 July 2009 (see V. Gaertner). The ECJ answered a year later; the judgment was published yesterday in OJ, C, 246.

The Facts

The order for reference states that in mid-2005 Ms Purrucker went to Spain to live with Mr Vallés Pérez. She gave premature birth to twins in May 2006. The boy -Merlín- was able to leave hospital in September 2006, whilst the girl -Samira- remained in hospital until March 2007.

Not wanting to be together any more, on 30 January 2007 the parties signed before a notary an agreement concerninginter alia parental responsibility, custody and rights of access to the children. According to Spanish Law the agreement had to be approved by a court in order to be enforceable. In the instant case it was never judicially ratified.

Ms Purrucker returned to Germany with the boy in February 2007; she intended also to bring her daughter to Germany after she left hospital.

Proceedings in Spain. Application for enforcement in Germany

Since Mr Vallés Pérez no longer felt bound by the agreement signed before a notary, he brought proceedings in June 2007 to obtain the granting of provisional measures and, in particular, rights of custody of the children before the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial. After some discussion, the Court confirmed her jurisdiction to rule on the application for provisional measures, and adopted the following urgent provisional measures:

"1. Joint rights of custody of the two children Samira and Merlín Vallés Purrucker are awarded to the father, Mr Guillermo Vallés Pérez; both parents are to retain parental responsibility.

In implementation of this measure, the mother must return the infant son Merlín to his father who is domiciled in Spain. Appropriate measures must be taken to

allow the mother to travel with the boy and to visit Samira and Merlín whenever she wishes, and, for that purpose, accommodation, which may serve as a family meeting place, must be placed at her disposal or may be placed at her disposal by a family member or by the trusted person who must be present during the visits for the entire time which the mother spends with the children, it being understood that the accommodation concerned may be that of the father if both parties so agree.

2. Prohibition on leaving Spain with the children without the court's prior approval.

3. Delivery of passports of each of the children to the possession of the parent exercising rights of custody.

4. Any change in the residence of the two children is subject to the prior approval of the court.

5. No maintenance obligation is imposed on the mother".

On 11 January 2008 the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial issued a certificate pursuant to Article 39(1) of Regulation No 2201/2003, certifying that its judgment was enforceable and that notice of it had been served. Immediately after, Mr Vallés Pérez brought in Germany, as a precautionary measure, an action for a declaration that the judgment delivered by the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial was enforceable. Next, he sought the enforcement of that judgment. Consequently, the Amtsgericht Stuttgart, by a decision of 3 July 2008, and the Oberlandesgericht Stuttgart, by a decision on appeal of 22 September 2008, ordered enforcement of the judgment of the Spanish court and warned the mother that she could be fined if she did not comply with the order.

Ms Purrucker challenged the judgment of the Oberlandesgericht Stuttgart of 22 September 2008 before the Bundesgerichtshof on the ground that, under Article 2(4) of Regulation No 2201/2003, the recognition and enforcement of judgments delivered by the courts of other Member States is not applicable to provisional measures within the meaning of Article 20 of that regulation, because they cannot be classed as judgments relating to parental responsibility.

The preliminary question

The Bundesgerichtshof observes that the question whether the provisions laid down in Article 21 et seq. of Regulation No 2201/2003 are also applicable to provisional measures within the meaning of Article 20 of that regulation or only to judgments on the substance is a matter of debate in academic writing which has not been definitively resolved by the case-law. Therefore, he decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

"Do the provisions of Article 21 et seq. of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000 1 (the Brussels IIa Regulation) concerning the recognition and enforcement of decisions of other Member States, in accordance with Article 2(4) of that regulation, also apply to enforceable provisional measures, within the meaning of Article 20 of that regulation, concerning the right to child custody?"

AG's Opinion

Advocate general E. Sharpston delivered a quite long opinion on 20 May 2010. In her view the ECJ should answer as follows:

– Provisional measures adopted by a court of a Member State on the basis of competence derived by that court from the rules on substantive jurisdiction in Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and [in] matters of parental responsibility must be recognised and enforced in other Member States in the same way as any other judgment adopted on the same basis, in accordance with Article 21 et seq. of that Regulation.

– Provisional measures adopted by a court of a Member State on the basis of national law in the circumstances set out in Article 20 of Regulation No 2201/2003 do not have to be recognised or enforced in other Member States in accordance with Article 21 et seq. of the Regulation. That Regulation does not, however, preclude their recognition or enforcement in accordance with procedures derived from national law, in particular those required by multilateral or bilateral conventions to which the Member States concerned are parties.

– A court hearing an application for recognition or non-recognition of a provisional measure, or for a declaration of enforceability, is entitled to ascertain

the basis of jurisdiction relied on by the court of origin either from the terms or content of its decision or, if necessary, by communicating with that court directly or through the appropriate central authorities. If, but only if, neither of those means produces a clear and satisfactory result, it should be presumed that jurisdiction was assumed in the circumstances set out in Article 20(1). In the case of provisional decisions on parental responsibility, the same means of communication may be used to verify whether the decision is (still) enforceable in the Member State of origin, if the accuracy of a certificate issued pursuant to Article 39 of Regulation No 2201/2003 is challenged; and, if such communication is unsuccessful, other means of proof may be used, provided that they are adduced in a timely manner.

The judgment

This is the concise ruling of the ECJ:

"The provisions laid down in Article 21 et seq. of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, do not apply to provisional measures, relating to rights of custody, falling within the scope of Article 20 of that regulation."

Some points that deserve consideration

We believe that some points of the ECJ's reasoning invite to reflection:

.- Concerning the scope of Article 20. In paragraph 64 the ECJ establishes which decisions fall within the scope of article 20. Following the Court, it is not only the nature of the measures which may be adopted by the court – provisional, including protective, measures as opposed to judgments on the substance – which determines whether those measures may fall within the scope of Article 20 of the regulation but rather, in particular, the fact that the measures were adopted by a court whose jurisdiction is not based on another provision of that regulation. Realistically, in paragraph 65, the ECJ acknowledges that "it is not always straightforward, from reading a judgment, to make such a classification of a judgment adopted by a court for the purposes of Article 2(1) of Regulation".

.- The meaning of the prohibition of reviewing the assessment of jurisdiction made

by a court of a Member State. See paragraph 75, “that prohibition does not preclude the possibility that a court to which a judgment is submitted which does not contain material which unquestionably demonstrates the substantive jurisdiction of the court of origin may determine whether it is evident from that judgment that the court of origin intended to base its jurisdiction on a provision of Regulation No 2201/2003. As stated by the Advocate General in point 139 of her Opinion, to make such a determination is not to review the jurisdiction of the court of origin but merely to ascertain the basis on which that court considered itself competent.” I find it difficult not to see this as examining the grounds of jurisdiction -although not in order to make a verdict on the recognition of the foreing judgment.

.- With regard to the system of recognition of the measures adopted under Article 20: “(…) it must be held that, as the Advocate General stated in points 172 to 175 of her Opinion, the system of recognition and enforcement provided for by Regulation No 2201/2003 is not applicable to measures which fall within the scope of Article 20 of that regulation.” The ECJ leans on the Borrás Report to the Brussels II Convention, reminding that Article 20(1) of Regulation 2201/2003 has its origins in Article 12 of Regulation No 1347/2000, which is a restatement of Article 12 of the Brussels II convention. The ECJ avoids, however, the differences between both Regulations.

.- On the possibility of recognizing provisional measures taken under Article 20 according to another system of recognition see paragraph 92, “The fact that measures falling within the scope of Article 20 of Regulation No 2201/2003 do not qualify for the system of recognition and enforcement provided for under that regulation does not, however, prevent all recognition or all enforcement of those measures in another Member State, as was stated by the Advocate General in point 176 of her Opinion. Other international instruments or other national legislation may be used, in a way that is compatible with the Regulation.” I wish the ECJ had explained this a little bit more.

.- Finally, see the ECJ comments on the domestic system of appeal when used to discuss international jurisdiction. More specifically, the ECJ seems to qualify the Spanish provisions as unsuitable in an international (community) context. To endorse this view the ECJ points out to the primacy of EU law over national law, and reminds the obligation to revise or interpret national law to ensure its conformity. That gives us Spaniards (at least) something to think about.

Hague Academy, Summer Programme for 2011

Private International Law: 25 July – 12 August, 2011

Carolyn LAMM, Partner White and Case (Washington D.C.)
25 July (Opening lecture)

H. Patrick GLENN, Professor at McGill University
1-12 August
General Course (The Conciliation of Laws)*

Adrian BRIGGS, Professor at the University of Oxford
25-29 July
The Principle of Comity in Private International Law

Dominique BUREAU, Professor at the University Paris ll (Panthéon-Assas)
25-29 July
Methodological Mutations in Contemporary Private International Law*

Johan MEEUSEN, Professor at the University of Antwerp
25-29 July
Private International Law and the Principle of Non-Discrimination*

Ronald BRAND, Professor at the University of Pittsburgh
1-5 August
Transaction Planning Using Rules on Jurisdiction and Judgments Recognition

Jan NEELS, Professor at the University of Johannesburg
1-5 August
Cultural Diversity and Constitutional Values in Private International Law

Yuko NISHITANI, Professor at Kyushu University, Japan
8-12 August
Cultural ldentity in Private lnternational Family Law*

Mpazi SINJELA, Former Dean of the WIPO World Wide Academy, Geneva
8-12 August
lntellectual Property: Cross-Border Recognition of Rights and National Development

* Lectures delivered in French, simultaneously interpreted into English.

Registration begins in November 2010.

The Saga on the Property in Croatia Taken to Foreigners in the Communist Era Seems to Have Reached the End

In reference to the post of 2008 reporting on the right of foreigners to claim compensation for or return of the property in Croatia taken during the communist era, the new decision of the Croatian Supreme Court merits attention.

The 2008 ruling by the Croatian Administrative Court recognized such right to a Brazilian national, i.e. her descendant of the first degree. This ruling was final and there were only extraordinary legal remedies available, among them the request for legality protection (*zahtjev za zaštitu zakonitosti*). On 19 June 2008, the Croatian State Attorney' Office launched such request before the Croatian Supreme Court, challenging the legality of the mentioned Croatian Administrative Court ruling. They essentially argued that the interpretation of the Administrative Court was incorrect because, in regard to Article 9 and 10 of the Compensation for the Taken Property during the Yugoslav Communist Government Act as

amended in 2002 (often referred to as the Compensation Act), the legislative intention was not to make all foreigners eligible to return of or compensation for the taken property, but only nationals of those countries which have concluded the treaties to that effect with Croatia. They also argued that, pursuant to another provision of the Act, the right to return or compensation belonged only to those persons having acquired the Croatian nationality after 11 October 1996.

Deciding in the chamber of five, the Croatian Supreme Court rendered a judgment on 25 May 2010. The Court entirely rejected the request for legality protection and upheld the challenged decision stating that the authentic legislative intent should be sought by looking into the context of the statutory amendments which were consequential to the 1999 Croatian Supreme Court decision. The judges continued:

> *Starting from this, and taking into account, inter alia, the argumentation of the Constitutional Court of the Republic of Croatia that the former owners which are not Croatian nationals have to be in principle recognized the right to compensation or return of the property, and that the conditions under which those persons should be recognized the right to compensation need to be defined, the conclusion has to be drawn that the legislator linked the right of a foreign person (natural and legal) to enforce the right to compensation for the taken property the to the concluded intergovernmental agreement.*
>
> *In this context it is obvious that in construing and searching for the genuine legislator's intent in regulating this matter, the provisions of Art. 10 paras. 1 and 2 of the Compensation Act need to be interpreted observing their mutual connection. The contents of para. 1 of this Article shows, thus, that the former owner shall not have the right to compensation for the taken property where this matter has been resolved under an intergovernmental agreement. By way of exception, according to para. 2 of the same Article, even where the issue of compensation for the taken property has already been resolved under the interstate agreement, the right to compensation may be acquired by the foreign persons if it is established by [another] interstate agreement. It derives under the interpretation argumentum a contrario that in other situations, where the issue of compensation is not resolved by an intergovernmental agreement, the former owner shall have the right to compensation for the taken property.*
>
> *By virtue of this, implementing the decision of the Constitutional Court of the*

> *Republic of Croatia, the legal statuses of former owners of taken properties are consequently made equal irrespective of their nationality, thus achieving the equality of citizens before the law.*

The Court concludes its reasons by stating that the requirement of Croatian nationality acquired after 11 October 1996, does not refer to the case at hand, and that this case falls under another provision which does not impose such requirements.

Such insistence of the Government of the Republic of Croatia not to recognize the right to return or compensation to foreigners must be understood against the background of more than 4000 requests being made from abroad, primarily from Israel, Austria, USA, Serbia, Argentina and Brazil, and of the estimation that these requests if accepted will cost the Republic of Croatia in between €350 and €500 million in the fortcomming period. However, in a view of 13 years that have passed from the date the application for return was submitted in this case, it is to be hoped that this is truly the final chapter of the saga.

Proving Foreign Law in U.S. Federal Court: Is The Use Of Foreign Legal Experts "Bad Practice"?

A panel of the United States Court of Appeals for the Seventh Circuit last week decided a fairly routine contract case—applying French law (opinion here). In doing so, Judges Easterbrook, Posner and Wood stated their views on the best means to prove foreign law. Of course, they each noted (in separate opinions) that the Federal Rules of Civil Procedure give courts a wide berth to rely on any source or authority, including sworn statements by experts in foreign law. But Judges Easterbrook and Posner see the use of such experts as "bad practice"—in

their view, it's better for judges to consult English-language translations and treatises, which will be relatively objective, rather than the statements of experts hired by each party. According to Judge Easterbrook:

> *Trying to establish foreign law through experts' declarations not only is expensive (experts must be located and paid) but also adds an adversary's spin, which the court then must discount. Published sources such as treatises do not have the slant that characterizes the warring declarations presented in this case. Because objective, English-language descriptions of French law are readily available, we prefer them to the parties' declarations.*

Indeed, Judge Easterbrook gave more credence to a Danish Court's resolution of a parallel case than the parties' experts. In his view, "Denmark is a civil-law nation, and a Danish court's understanding and application of the civil-law tradition is more likely to be accurate than are the warring declarations of the paid experts in this litigation."

Judge Posner was even more scathing of foreign legal experts. He wrote separately "merely to express emphatic support for, and modestly to amplify, the court's criticism of a common and authorized but unsound judicial practice. That is the practice of trying to establish the meaning of a law of a foreign country by testimony or affidavits of expert witnesses":

> *Lawyers who testify to the meaning of foreign law, whether they are practitioners or professors, are paid for their testimony and selected on the basis of the convergence of their views with the litigating position of the client, or their willingness to fall in with the views urged upon them by the client. These are the banes of expert testimony. When the testimony concerns a scientific or other technical issue, it may be unreasonable to expect a judge to resolve the issue without the aid of such testimony. But judges are experts on law, and there is an abundance of published materials, in the form of treatises, law review articles, statutes, and cases, . . . to provide neutral illumination of issues of foreign law. I cannot fathom why in dealing with the meaning of laws of English-speaking countries that share our legal origins judges should prefer paid affidavits and testimony to published materials. It is only a little less perverse for judges to rely on testimony to ascertain the law of a country whose official language is not English, at least if is a major country and has a modern legal system [(because law and secondary sources are readily translated into*

> *English)]. . . . [O]ur linguistic provincialism does not excuse intellectual provincialism. It does not justify our judges in relying on paid witnesses to spoon feed them foreign law . . . . I do not criticize the district judge in this case, because he was following the common practice. But it is a bad practice, followed like so many legal practices out of habit rather than reflection. . . .*

Judge Wood disagreed, arguing that judges are too likely err in interpreting foreign law, especially when it is in a foreign language:

> *Exercises in comparative law are notoriously difficult, because the U.S. reader is likely to miss nuances in the foreign law, to fail to appreciate the way in which one branch of the other country's law interacts with another, or to assume erroneously that the foreign law mirrors U.S. law when it does not. . . .*
>
> *There will be many times when testimony from an acknowledged expert in foreign law will be helpful, or even necessary, to ensure that the . . . U.S. judge understands the full context of the foreign provision. Some published articles or treatises, written particularly for a U.S. audience, might perform the same service, but many will not, even if they are written in English, and especially if they are translated into English from another language. It will often be most efficient and useful for the judge to have before her an expert who can provide the needed precision on the spot, rather than have the judge wade through a number of secondary sources. In practice, the experts produced by the parties are often the authors of the leading treatises and scholarly articles in the foreign country anyway. In those cases, it is hard to see why the person's views cannot be tested in court, to guard against the possibility that he or she is just a mouthpiece for one party.*

Both Judges Easterbrook and Posner recognized a caveat. According to the latter, the use of foreign law experts was "excusable only when the foreign law is the law of a country with such an obscure or poorly developed legal system that there are no secondary materials to which the judge could turn." The former would allow an expert to help determine the law of countries who do not "engage in extensive international commerce." This begs a question of line-drawing. One might assume that a U.S. judge would do his own research of an English-speaking common law system, irrespective of how much "international commerce" flowed through its

ports. At the other end of the spectrum, the law of the Congo might be best explained by an expert. In between, as queried by Eugene Volokh, what about a country like Saudi Arabia, which is economically quite significant, but its legal system is so different from ours in many ways that I suspect most judges would want to hear from experts? What would Judges Easterbrook and Posner say about Chinese law, which is also radically different from ours but is an economic powerhouse and is the subject of a good deal of written English-language commentary? Perhaps, in close cases, courts may be more willing to hire their own foreign law experts pursuant to Federal Rule of Evidence 706, as is sometimes done. *See, e.g., Saudi Basic Indust.Corp. v. Mobil Yanbu Petrochemical Co., Inc.*, 866 A.2d 1, 30-32 (Del. 2005).

Second Issue of 2010's Revue Critique de Droit International Privé

The last issue of the *Revue critique de droit international privé* was released in August. It contains two articles and several casenotes.

The first article is authored by Sara Godechot-Patris, who is a professor of law at the University of Tours. The article purports to revisit the concept of equivalence for the purpose of coordination of legal systems (*Retour sur la notion d'équivalence au service de la coordination des systèmes*). The English abstract reads:

> *Invoked in a myriad of different situations and in a confusing number of directions within the framework of the conflict of laws, the concept of equivalence – which guarantees the integration within the forum legal order of situations conforming to foreign legal institutions – requires its use to be subject to greater discipline. This should take place by framing the conditions in which it operates, firstly through characterisation of the legal relationship,*

whether in view of the selection of a choice of law rule or in order to identify the substantive rules of the governing law, and secondly by subordinating the assessment to the requirements of coherence of the forum legal order. This will regulate its effects, not only in the case where an assessement of equivalence is positive and permits a substitution-assimilation or the subsidiarity application of the law of the forum, but also when the assessement is negative. In such a case, the refusal will not necessarily lead to a rejection of the foreign legal institution, since the necessary respect of the integrity of the forum legal order may lead to adding a new legal construct or category.

The second article is from Khalid Zaher, who is a professor of law at the university of Fes (Morocco). It present the case for the recognition of Moroccan divorces after a recent decision of the French supreme court for private matters (*Plaidoyer pour la reconnaissance des divorces marocains. A propos de l'arrêt de la première chambre civile du 4 novembre 2009*). Unfortunately, there is no abstract.

The full table of content of the *Revue* can be seen here.

Licari on Punitive Damages

François-Xavier Licari, Professor at the University of Metz (Paul-Verlaine) has posted Taking Punitive Damages Seriously: Why a French Court Did Not Recognize An American Decision Awarding Punitive Damages and Why it Should Have on SSRN. Here is the English abstract (the article is written in French):

Recently, a French Court of Appeal (*cour d'appel*) refused to recognize a California judgment (to grant an "exequatur") that awarded punitive damages to American citizens in a breach of contract case involving the sale of a ship from French sellers. The French Court gave several reasons in refusing to grant the exequatur, particularly: French law only allows for compensatory damages and considers the principle of full compensation as fundamental; punitive damages create an unjust enrichment (a windfall) for the plaintiff. In effect, the punitive

damages given by the California court were disproportionate to the actual damages. In sum, punitive damages hurt French public policy (*l'ordre public international français*). The author contends that none of these arguments stand up to an objective examination. For example, a close look at French case law shows the principle of full compensation has never been considered as belonging to the ordre public in the international sense of the notion. Furthermore, French private law knows "private penalties" (*peines privées*), and some of them resemble American punitive damages. Last but not least, two recent law reform proposals militate in favor of the introduction of punitive damages to the French Civil Code. This essay advocates for a better understanding of the notion of punitive damages and their role in American law, and urges French courts to give effect to reasonable punitive damage awards.

This article will be published in the forthcoming issue of the *Journal du Droit International.*

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (5/2010)

Recently, the September/October issue of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was published.

Here is the contents:

- ***Peter Mankowski****:* "Ausgewählte Einzelfragen zur Rom II-VO: Internationales Umwelthaftungsrecht, internationales Kartellrecht, renvoi, Parteiautonomie" – the English abstract reads as follows:

> *The Rome II Regulation is up for regular review in the near future. Some of its rules deserve closer consideration. This relates in particular to Art. 7 on environmental liability which does not address the paramount question to which*

extent permissions granted by one Member State influence liability. Insofar a detailed solution by way of recognition is proposed. Another field open for reform is party autonomy under Art. 14. Insofar a number of proposals is submitted generally attempting to bring Art. 14 better in line with other rules of Community law. A systematic restructuring of Art. 6 (3) on competition law is advocated for, too. In contrast, it does not appear to alter anything with regard to the exclusion of renvoi.

- ***Beate Gsell/Felix Netzer***: "Vom grenzüberschreitenden zum potenziell grenzüberschreitenden Sachverhalt – Art. 19 EuUnterhVO als Paradigmenwechsel im Europäischen Zivilverfahrensrecht" – the English abstract reads as follows:

This article sheds light on a new development in European Civil Procedure Law caused by Article 19 Regulation (EC) No 4/2009 of 18 December 2008 on maintenance obligations. It illustrates the differences between Article 19 Regulation (EC) No 4/2009 and related Articles in the Regulations on the European enforcement order for uncontested claims, the European order for payment procedure and the European small claims procedure. The authors demonstrate that Article 19 (EC) No 4/2009 provides the defendant with an autonomous right to apply for a review of a national court's decision in order to compensate the abolition of the exequatur. Thereby European Civil Procedure Law does not confine its scope to cross-border cases, but, on the grounds of an only potential Europe-wide recognition and enforcement of judgements, intervenes in merely national procedures as well. After discussing the consequences of this principle change in European Civil Procedure Law, the authors doubt the EU's competence under Article 65 EC or Article 81 TFEU to intervene in national procedure law as regulated in Article 19 (EC) No 4/2009.

- ***Anne Röthel/Evelyn Woitge***: "Das ESÜ-Ausführungsgesetz – effiziente Kooperation im internationalen Erwachsenenschutz" – the English abstract reads as follows:

The coming into force of the Hague Convention on the International Protection of Adults on 1 January 2009 gives reason to examine the German Implementation Act. Its purpose is to include the regulations of the Convention into the internal German system for the protection of adults who are suffering

from an impairment or an insufficiency in their personal facilities and therefore are not able to safeguard their own interests. In this article, the authors show the major content of the Implementation Act and discuss how the rules on jurisdiction, applicable law and international recognition and enforcement of protective measures laid down by the Convention fit into existing German law. Also, they highlight the concept of administrative co-operation between member states drawn up by the Convention and put into effect by national law.

- ***Jörn Griebel***: "Einführung in den Deutschen Mustervertrag über die Förderung und den gegenseitigen Schutz von Kapitalanlagen von 2009" – the English abstract reads as follows:

The article comments on the new German Model BIT (bilateral investment treaty) of 2009. After a general description of its content, some changes of the new model in comparison to its predecessors are addressed. Against the background of various models by other states, the question will be raised as to whether some necessary changes were omitted. It is also discussed to what degree different approaches to reforming model BITs are due to political reasons and/or different approaches to treaty drafting.

- ***Axel Metzger***: "Zum Erfüllungsortgerichtsstand bei Kauf- und Dienstleistungsverträgen gemäß der EuGVVO" – the English abstract reads as follows:

The Car Trim decision of the ECJ puts a spotlight on two important and yet unsettled questions regarding the jurisdiction at the place of performance in sales and service contracts under Art. 5 Nr. 1 lit. b Brussels I Regulation. The author agrees with the Court's ruling that contracts for the supply of goods to be manufactured or produced should be characterised as sales contracts as long as the purchaser has not supplied the materials. However, the ruling should not be generalised to all types of mixed contracts with service components. The Car Trim decision is also correct in localising the place of performance in case of a sale involving carriage of goods at the place where the purchaser obtained actual power of disposal over the goods at the final destination and not at the place at which the goods are handed over to the first carrier for transmission to the purchaser. Finally, the author examines some of the general questions on autonomous interpretation of Art. 5 Nr. 1 lit. b

Brussels I Regulation raised by the Court.

- ***Ben Steinbrück***: "Internationale Zuständigkeit deutscher Gerichte für selbstständige Beweisverfahren in Schiedssachen" – the English abstract reads as follows:

The author comments on a decision of the Higher Regional Court Düsseldorf (7 February 2008 – I-20 W 152/07), which deals with the competence of German courts to preserve evidence for use in foreign arbitration proceedings. The court ruled that parties who agree that their dispute shall be resolved by a foreign arbitral tribunal pursuant to a foreign law derogate the German courts' international jurisdiction to make (interim) orders in independent proceedings for the taking of evidence ("selbständiges Beweisverfahren"). This decision is not in line with German arbitration law. According to §§ 1025 Abs. 2, 1033 of the German Code of Civil Procedure German courts arbitration agreements conferring jurisdiction on a foreign arbitral tribunal do not affect the German courts' competence to grant interim relief. It follows that these competences, including the power to preserve evidence, can only be excluded by an explicit agreement to that effect.

- ***Rolf A. Schütze*** on the principle of reciprocity in relation to South Africa: "Zur Verbürgung der Gegenseitigkeit im Verhältnis zu Südafrika"
- ***Peter Kindler***: "Zum Kollisionsrecht der Zahlungsverbote in der Gesellschaftsinsolvenz" – the English abstract reads as follows:

Under German law, the managing director of a company is obliged to reimburse the company any payment that has been made to a third party – e.g. a creditor or a shareholder – after the company's insolvency or over-indebtedness (see, e.g. sec. 64 of the law pertaining to private companies ltd. by shares – GmbHG).1 The Berlin Kammergericht holds that this rule of law also applies to a managing director of a company registered abroad – in this case a British Ltd. – with its centre of main interests in Germany (sec. 3 of the EC Regulation 1346/2000 on cross border insolvency). The author welcomes this decision.

- ***Fabian Wall***: "Enthält Art. 21 Abs. 1 AEUV eine „versteckte" Kollisionsnorm?" – the English abstract reads as follows:

According to the judgment of the European Court of Justice in the case "Grunkin and Paul", Article 21 TFEU (ex Article 18 TEC) awards the right to every citizen of the Union that each Member State has to recognise a surname which has been formerly determined and lawfully registrated in a civil register of another Member State. Until now, it is uncertain how the demand of the Court of Justice can be implemented in german practice. This is demonstrated by a case decided recently by the Higher Regional Court of Munich. The legal question is whether Article 21 TFEU should be interpreted as a target which leaves the national authorities the choice of form and methods of implementation or whether Article 21 TFEU should be interpreted as a "hidden" conflict of laws rule which is directly applicable in all Member States.

- ***Martin Illmer***: "La vie après Gasser, Turner et West Tankers – Die Anerkennung drittstaatlicher anti-suit injunctions in Frankreich" – the English abstract reads as follows:

The strong winds from Luxembourg blowing in the face of anti-suit injunctions have extinguished the remedy within the territorial and substantive scope of the Brussels I Regulation. Yet, anti-suit injunctions are not dead even within the European Union. Rather, the focus shifts to the remaining areas of operation. One of these areas concerns anti-suit injunctions issued by non-member state courts against parties initiating proceedings before member state courts. Since the Brussels I Regulation does not cover extra-territorial scenarios, the rationale of the ECJ's judgments in Gasser, Turner and West Tankers does not apply. Faced with such an anti-suit injunction, it is entirely up to the national law of the respective Member State whether or not to recognize it. While the Belgian and German courts had refrained to do so in the past, the French Cour de Cassation in a recent straight forward judgment has had no difficulty in recognizing and enforcing an anti-suit injunction of a US state court (Georgia).

- ***Ulrich Spellenberg*** on Art. 23 Brussels I Regulation: "Der Konsens in Art. 23 EuGVVO – Der kassierte Kater"
- ***Carl Friedrich Nordmeier***: "Portugal: Änderungen im internationalen Zuständigkeitsrecht" – the English abstract reads as follows:

By art. 160 of law n. 52/2008 of 28 of August 2008, Portugal reformed its autonomous rules on jurisdiction, art. 65 and 65-A of the Civil Procedure Code.

This contribution gives a short overview of the new rules, focussing especially on the applicability in time.

- ***Christoph Benicke***: "Die Neuregelung des internationalen Adoptionsrechts in Spanien" – the English abstract reads as follows:

With the law 54/2007 of 28 December 2007 the Spanish legislator has enacted a special law on international adoption which encompasses rules on jurisdiction, applicable law and the recognition of foreign adoption decisions in Spain. The new law has the advantage that it summarizes the scattered arrangements into one piece of legislation. It also represents a step forward in that the transformation of a weak foreign adoption in a strong adoption is now possible. But the reform remains half hearted as it restricts the recognition of a weak foreign adoption to cases where none of the parties has the Spanish nationality. In addition, both the conflict of laws rule and the rules on the recognition of foreign adoption decisions are substantively implausible. Most schemes have been taken over from the existing legal situation which had in great part been formed by decisions of the General Directorate of public registries and of the notary system (Dirección General de los Registros y del Notariado) without of systematic guideline. Significantly, there are many technical shortcomings in the legislation. Overall, the new law fails to create a modern, autonomous international adoption law. This is all the more striking since the motives express the aim to reach the standard of the Hague Adoption Convention of 1993.

- ***Viviane Reding*** on the European Civil Code and PIL: "Zum Europäischen Zivilgesetzbuch und IPR"
- ***Rolf Wagner***: "Die zivil(verfahrens-)rechtlichen Komponenten des Aktionsplans zum Stockholmer Programm" – the English abstract reads as follows:

The "Stockholm Programme – An open and secure Europe serving and protecting the citizens" covering the period 2010–2014 defines strategic guidelines for legislative and operational planning within the area of freedom, security and justice. Recently the European Commission finalized an action plan. The action plan entails lists of measures with time limits implementing the Stockholm Programme. The article provides an overview on this action plan.

Second Issue of 2010's Revue de l'Arbitrage

The second issue of 2010's French *Revue de l'arbitrage* was released in July.

It contains three articles, one of which addresses an issue of private international law. It is authored by Mathias Audit, who is professor of law at the University Paris Ouest (formerly Paris 10) and discusses the influence of the recent *INSERM* judgment of one of French supreme courts on the regime of arbitration of disputes arising out of international administrative contracts (*Le nouveau régime de l'arbitrage des contrats administratifs internationaux (à la suite de l'arrêt rendu par le Tribunal des conflits dans l'affaire* INSERM*)*). The English abstract reads:

> *Pursuant to a judgment of 17 May 2010, the "Conflicts Court" ("Tribunal des conflits") laid down the first foundations for the international arbitral regime to be applied to administrative contracts concluded by French public bodies with foreign contracting parties. The Court has in particular decided to entrust to administrative courts the review of awards issued under certain types of such contracts. Using this judgment as a starting point, this article aims to review more generally this new regime which now applies to arbitration of disputes arising under international administrative contracts.*

Knowles on the Alien Tort Statute

Robert Knowles, who is a Visiting Assistant Professor at Chicago-Kent College of Law, has posted A Realist Defense of the Alien Tort Statute on SSRN. Here is the abstract:

This Article offers a new justification for modern litigation under the Alien Tort Statute ("ATS"), a provision from the 1789 Judiciary Act that permits victims of human rights violations anywhere in the world to sue tortfeasors in U.S. courts. The ATS, moribund for nearly 200 years, has recently emerged as an important but controversial tool for the enforcement of human rights norms. "Realist" critics contend that ATS litigation exasperates U.S. allies and rivals, weakens efforts to combat terrorism, and threatens U.S. sovereignty by importing into our jurisprudence undemocratic international law norms. Defenders of the statute, largely because they do not share the critics' realist assumptions about international relations, have so far declined to engage with the cost-benefit critique of ATS litigation and instead justify the ATS as a key component in a global human rights regime.

This Article addresses the realists' critique on its own terms, offering the first defense of ATS litigation that is itself rooted in realism – the view that nations are unitary, rational actors pursuing their security in an anarchic world and obeying international law only when it suits their interests. In particular, this Article identifies three flaws in the current realist ATS critique: First, critics rely on speculation about catastrophic future costs without giving sufficient weight to the actual history of ATS litigation and to the prudential and substantive limits courts have already imposed on it.

Second, critics' fears about the sovereignty costs that will arise when federal courts incorporate international-law norms into domes-tic law are overblown because U.S. law already reflects the limited set of universal norms, such as torture and genocide, that are actionable under the ATS. Finally, this realist critique fails to overcome the incoherence created by contending that the exercise of jurisdiction by the courts may harm U.S. interests while also assuming that nations are unitary, rational actors.

Moving beyond the critique, this Article offers a new, positive realist argument for ATS litigation. This Article suggests that, in practice, the U.S. government as a whole pursues its security and economic interests in ATS litigation by signaling cooperativeness through respect for human rights while also ensuring that the law is developed on U.S. terms. This realist understanding, offered here for the first time, both explains the persistence of ATS litigation and bridges the gap that has frustrated efforts to weigh the ATS's true costs and benefits.

The article is forthcoming in the *Washington University Law Review*, Vol. 88, 2011.

Third Issue of 2010's Journal du Droit International

The third issue of French *Journal du droit international* (*Clunet*) for 2010 was just released.

It includes four articles and several casenotes. Two of the articles deal with conflict issues.

The first one is authored by Nabil Ferjani and Véronique Huet and discusses the impact of embargo United Nation decisions on the performance of international contracts (*L'impact de la décision onusienne d'embargo sur l'exécution des contrats internationaux*). The English abstract reads:

> *Generally, an international contract has to been studied in a very large context, in relation with political, juridical and economic circumstances in what it takes place. This is all right if we consider the juridical order to the conclusion of this form of contract during all its existence. The international doctrine gives a good place to contractual clauses and to their interprÉtation by arbiters of international commerce. Defined as a temporary measure, the pre-juridical decision of embargo, adopted as by UNI, as unilaterally, as by regional organizations, ended as soon as the infractions of a State have been finished, in period of armed or post-conflict, in the only goal to end the violation of the international legality. The smart sanctions adopted by Security Council of the United Nations these last years have to been considered as a just and proportionate appreciation of humanitarian situations of suffering people.*

The second one is authored by Bernard Haftel, who lectures at the University of Orleans, and discusses the uniform interpretation of the Rome I Regulation (*Entre*

Rome II et Bruxelles I. L'interprétation communautaire uniforme du Règlement Rome I). The English abstract reads:

> *Last-born among European Union Private International Law, the « Rome I » Regulation establishes rules concerning the law applicable to contracts. Thus, some of its notions and terms are also in use in other European Union Regulations concerning Private International Law such as the « Brussels I » and the « Rome II » Regulations. « Rome I » and « Rome II » deal with the same legal issue – i.e. choice of Law – but one focuses on the contractual side while the other considers the non-contractual side of obligations. « Rome I » and « Brussels I » both deal with matters relating to contracts, the former establishing the Choice of Law rules while the latter deals with Jurisdiction. Therefore, a study of these regulations seems necessary in order to determine to what extent the interpretations adopted by the Court of Justice for one of these Regulations should, or shouldn't, be used for the others.*